Tang Hak Ju v Ketua Menteri Negeri Pulau Pinang & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01–38 OF 2009

KN SEGARA, ABU SAMAH JJCA AND ABDUL WAHAB PATAIL J

20 JULY 2009

Administrative Law — Judicial review — Application for — Whether judicial review proceedings may be taken against State Government to compel payment of judgment sum as certified in certificate issued under s 33 of the Government Proceedings Act 1956 — Whether order of mandamus may be issued

Civil Procedure — Government proceedings — Application for certificate for payment of judgment sum — Judgment obtained against state government — Defendant appealed against quantum of damages but no stay of execution granted — Whether certificate could be issue notwithstanding appeal was pending — Whether court may order sums to be paid into court pending disposal of appeal — Government Proceedings Act 1956 s 33(3)

The Penang State Government had wrongfully cancelled the appellant's title to a piece of land. Thereupon the appellant filed an action against the Pengarah Tanah Galian Pulau Pinang, Pendaftar Hakmilik Tanah Pulau Pinang and Pentadbir Tanah Daerah Seberang Perai Tengah and obtained judgment against them. All appeal avenues against the judgment on liability were exhausted. The deputy registrar later assessed the damages and the defendants appealed against the quantum. The defendants' application for stay of execution pending the appeal was dismissed. The appellant repeatedly requested the State Government for payment but was ignored. Consequently, upon the appellant's application, the High Court issued a certificate pursuant to s 33 of the Government Proceedings Act 1956 ('GPA') stating the judgment sum owing whilst suspending payment of half of the judgment sum pending disposal of the appeal on quantum. The respondents took no steps to set aside the certificate and failed to honour payment. The appellant therefore applied for judicial review for an order of mandamus to compel the respondents to comply with the certificate. The learned judge dismissed this application and instead ordered the sum to be paid by the respondents into court pending disposal of the appeal on quantum. Hence this appeal by the appellant.

Held, allowing the appeal with costs here and below:

(1) The learned trial judge had misdirected himself in failing to appreciate that: (i) there was no valid stay of execution on the assessment of damages; and (ii) that s 33(3) of the GPA certificate had never been set aside. In the circumstances, it was not open to the learned judge to rule that the certificate was obtained prematurely and that it ought to be applied for only after the appeal on quantum had been finally disposed of. On this ground alone the appeal should be allowed (see para 15).

(2) A certificate under s 33 of the GPA can be issued even when an appeal is still pending subject to the discretion of the court to direct that the payment of the whole or part of the judgment sum be suspended pending the appeal (see para 16).

(3) There is no provision exempting the government from payment to the person entitled when there is an appeal or providing for payment into court instead. By s 33(3) of the GPA the government is under a statutory duty to pay the judgment sum as stated in the certificate. This duty to pay under s 33(3) is clearly a statutory duty which is binding on the State Government. There is no discretion whether or not to pay; *Minister of Finance, Government of Sabah v Petrosajasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 AMR 1 referred (see para 17).

(4) The third respondent, as the officer in charge of financial matters for the state was responsible for the payment of the sum stated in the certificate. It was incumbent upon the court to give effect to such statutory duty to pay through the coercive force of an order of mandamus against the third respondent (see para 18).

[Bahasa Malaysia summary

Kerajaan Negeri Pulau Pinang telah secara salah membatalkan hakmilik perayu terhadap sebidang tanah. Oleh itu perayu memfailkan tindakan terhadap Pengarah Tanah Galian Pulau Pinang, Pendaftar Hakmilik Tanah Pulau Pinang dan Pentadbir Tanah Daerah Seberang Perai Tengah dan memperoleh penghakiman terhadap mereka. Semua cara rayuan terhadap penghakiman ke atas liabiliti telah digunakan. Timbalan pendaftar kemudiannya menilai ganti rugi dan defendan-defendan merayu terhadap kuantum. Permohonan defendan-defendan untuk penggantungan perlaksanaan sementara menunggu keputusan rayuan telah ditolak. Perayu berulang kali meminta bayaran daripada Kerajaan Negeri tetapi tidak diendahkan. Oleh yang demikian, atas permohonan perayu, Mahkamah Tinggi mengeluarkan sijil akuan menurut s 33 Akta Prosiding Kerajaan 1956 ('APK') menyatakan jumlah penghakiman di samping menggantung pembayaran separuh daripada jumlah penghakiman sementara menunggu

keputusan rayuan mengenai kuantum. Responden-responden tidak mengambil langkah-langkah untuk mengetepikan sijil akuan tersebut dan gagal untuk membuat bayaran. Oleh itu perayu memohon semakan kehakiman untuk perintah mandamus bagi mendesak responden-responden mematuhi sijil akuan tersebut. Hakim yang bijaksana menolak permohonan ini dan sebaliknya mengarahkan responden-responden membuat bayaran jumlah yang sepatutnya sementara menunggu keputusan rayuan mengenai kuantum. Oleh itu rayuan ini oleh perayu.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan di Mahkamah Tinggi:

(1) Hakim mahkamah perbicaraan telah tersalah arah kerana gagal menghargai bahawa: (i) tidak terdapat penggantungan pelaksanaan yang sah mengenai penilaian ganti rugi; dan (ii) bahawa sijil akuan s 33(3) APK tidak diketepikan. Dalam keadaan ini, hakim yang bijaksana tidak boleh memutuskan bahawa sijil akuan tersebut didapati secara pramatang dan ia seharusnya dipohon hanya selepas rayuan mengenai kuantum diputuskan. Hanya berdasarkan alasan ini, rayuan tersebut sepatutnya dibenarkan (lihat perenggan 15).

(2) Sijil akuan di bawah s 33 APK boleh dikeluarkan walaupun ketika menunggu keputusan rayuan, ini tertakluk kepada budi bicara mahkamah untuk mengarahkan bahawa bayaran keseluruhan atau sebahagian jumlah penghakiman digantung sementara menunggu keputusan rayuan (lihat perenggan 16).

(3) Tidak terdapat peruntukan yang mengecualikan kerajaan daripada membuat bayaran kepada orang yang berhak apabila terdapat rayuan atau sebaliknya membuat bayaran kepada mahkamah. Melalui s 33(3) APK, kerajaan mempunyai kewajipan statutori untuk membayar jumlah penghakiman seperti yang dinyatakan dalam sijil akuan. Kewajipan untuk membayar di bawah s 33(3) jelas merupakan kewajipan statutori yang mengikat Kerajaan Negeri. Tidak terdapat budi bicara sama ada perlu membuat bayaran atau tidak; *Minister of Finance, Government of Sabah v Petrosajasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 AMR 1 dirujuk (lihat perenggan 17).

(4) Responden ketiga yang merupakan pegawai yang mengendalikan urusan kewangan negeri bertanggungjawab untuk membayar jumlah yang dinyatakan dalam sijil akuan. Adalah menjadi kewajipan mahkamah untuk melaksanakan kewajipan statutori melalui desakan perintah mandamus terhadap responden ketiga (lihat perenggan 18).]

Notes

For a case on application for certificate for payment of judgment sum, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2838.

For cases on application for, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

Cases referred to

Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 AMR 1, FC (refd)

Legislation referred to

Government Proceedings Act 1956 s 33, 33(2), (3), (4)

Appeal from: Application for Judicial Review No 25–103 of 2008 (MT-3) (High Court, Pulau Pinang)

Wong Yee Chue (Lim Kean Siew & Co) for the appellant.
Mohd Ghazali bin Mohamad Taib (State Legal Adviser's Office, Penang) for the respondents.

KN Segara JCA:

[1] The appeal before us is against the learned High Court judge's decision in dismissing on 19 February 2009 the appellant's application for an order of mandamus to coerce the respondents to carry out their statutory duty under s 33(3) of the Government Proceedings Act 1956 ('GPA') to honour payment of half of a judgment sum with interest as required by the certificate issued by the court on 12 August 2008. The learned judge instead directed the respondents to deposit the said judgment sum in to court (pending the disposal of an appeal by the respondents against the quantum of damages assessed by the deputy registrar, pursuant to the judgment of the High Court judge on 4 October 2005).

[2] The appellant is merely seeking the assistance of the court to get the State Government to satisfy the judgment sum obtained against its officers. The procedure to be followed is set out in s 33 of the GPA which reads as follows:

> 33(1)When in any civil proceedings by or against the Government or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown side of the Queen's Bench Division, or in connection with any arbitration to which the Government is a party, any order (including an

order for costs) is made by any court in favour of any person against the Government or *against an officer of the Government* as such, the proper officer of the court shall on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person on whose favour the order is made upon the person for the time being named in the record as the advocate for the Government or for the Government department or officer concerned.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due hereon:

Provided that *the court by which any such order as aforesaid is made* or any court to which an appeal against the order lies *may direct that*, pending an appeal or otherwise, *payment of the whole of any amount so payable*, or any part thereof, *shall be suspended*, and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.

(Emphasis added.)

[3] We are of the view that there is only one primary issue before us, namely: Has the judge misdirected himself in law in refusing an order of mandamus when directing the respondents to deposit into court the judgment sum in the fact of an unchallenged certificate under s 33 of the GPA issued to the appellant and the absence of a stay of execution of the damages assessed by the deputy registrar?

[4] Briefly, the background facts leading up to the issue of the certificate under s 33 of the GPA and the application for judicial review for an order of mandamus is as follows. A

[5] On 24 January 2005 the Penang State Government wrongfully and arbitrarily cancelled the appellant's title to a piece of quarry land. Thereupon the appellant filed Originating Summons No 24–151 of 2005 on 1 February 2005 against: B

(a) Pengarah Tanah Galian Pulau Pinang;

(b) Pendaftar Hakmilik Tanah Pulau Pinang; and C

(c) Pentadbir Tanah Daerah Seberang Perai Tengah.

[6] The plaintiff (appellant) obtained judgment against the said defendants (respondents) on 4 October 2005 and the learned judge directed the damages to be assessed by the deputy registrar. All appeal avenues against the said judgment on liability have been exhausted and the said judgment stands undisputed. The learned judge in his written grounds of judgment stated 'This court... found for the plaintiff and held that he was entitled to damages for, inter alia, loss of profit and loss of goodwill. It accordingly awarded the plaintiff such damages to be assessed'. D E

[7] On 21 September 2007, the deputy registrar assessed the damages at RM29,356,271 with interest thereon at the rate of 8%pa from 24 January 2005 until full realisation. The defendants appealed to judge in chambers on 25 September 2007 but has been *adjourned* several times upon the *defendants*' request. The defendants' application for *stay of execution pending the appeal was dismissed* with costs on 5 October 2007 by the deputy registrar. F G

[8] It is not disputed that although the State Government was not cited as a party by the plaintiff in Originating Summons No 24–151 of 2005, nevertheless the three defendants cited are officers of the government and were executing their official duties at all material times. In the upshot, the government would be liable to pay the quantum of damages assessed. H

[9] The appellant, between 21 September 2007 and 2 July 2008 made repeated requests to the State Government, through its solicitors, for payment and/or amicable settlement but was totally ignored (see letters pp 118–127 record of appeal vol 2). Consequently, upon the appellant's application on 12 August 2008 the High Court issued a certificate ('SIJIL UNTUK PERINTAH BAYARAN GANTIRUGI TERHADAP KERAJAAN') pursuant to s 33 of the GPA stating the amount of the judgment sum owing whilst suspending payment of half of the judgment sum pending the disposal I

of the defendants' appeal to judge in chambers against the quantum on the assessment of damages. The relevant parts of the certificate read:

> MENURUT PERINTAH MAHKAMAH INI bertarikh 4/10/2005... DAN MENURUT PENGHAKIMAN SELEPAS TAKSIRAN GANTIRUGI MAHKAMAH INI bertarikh 21/9/2007 telah dihakimi dan diperintahkan bahawa Defendan-defendan hendaklah secara bersesama dan berasingan membayar kepada Plaintiff gantirugi sejumlah RM29,356,271.00 dengan faedah di atasnya pada kadar 8% setahun dikira dari 24/1/2005 sehingga penyelesaian penuh dan kos-kos untuk taksiran gantirugi, yang akan ditetapkan.
>
> Saya dengan ini mengesahkan bahawa gantirugi yang kena dibayar oleh Defendan-defendan kepada Plaintiff berikutan daripada Perintah dan Penghakiman tersebut adalah sejumlah RM29,356,271–00 dengan faedah di atas jumlah gantirugi tersebut pada kadar 8% setahun dikira dari 24/1/2005 sehingga pembayaran penuh.
>
> Saya dengan ini juga mengarahkan menurut proviso kepada seksyen 33(3) Akta Prosiding Kerajaan 1956 bahawa pembayaran separuh daripada jumlah gantirugi tersebut digantungkan sehingga rayuan Defendan-defendan melalui Notis Rayuan Kepada Hakim Dalam Kamar bertarikh 25/9/2007 (Lampiran 47) diputuskan.
>
> Sijil ini tidak merangkumi jumlah yang kena dibayar di bawah Perintah Penghakiman tersebut berkenaan dengan kos-kos.

[10] Therefore the amount payable in accordance with the certificate was RM14,678,135.50 with interest at 8%pa calculated from 24 January 2005. The certificate was duly served on the state legal advisor on 18 August 2008 together with a request for payment vide solicitors' letter dated 15 August 2008. Copies of the certificate and the solicitors letter were also served on (1) Ketua Menteri Pulau Pinang, (2) Setiausaha Kerajaan Negeri, Pulau Pinang and (3) Pegawai Kewangan Negeri Pulau Pinang (the respondents herein). The respondents took no steps to set aside the certificate.

[11] The respondents totally failed to honour payment in accordance with the certificate despite the appellant's warning that an application for mandamus would be made as stated in the solicitors' letter dated 8 September 2008 as follows:

> 6. Sila ambil perhatian bahawa jika pihak Kerajaan Negeri Pulau Pinang gagal membuat bayaran dalam tempoh 10 hari dari tarikh surat ini, iaitu sebelum atau pada 18 September 2008, pelanggan kami tiada pilihan melainkan membuat permohonan kepada mahkamah untuk suatu perintah mandamus bagi memaksa pematuhan kewajipan statutori tersebut tanpa sebarang notis yang selanjutnya...

[12] The appellant obtained leave to apply for judicial review for an order of mandamus on 26 September 2008. The notice of hearing of the application for judicial review was finally heard on 21 February 2008 and on 19 February 2009 the learned judge dismissed the appellant's application for an order of mandamus to compel the respondents to comply with the certificate. He instead ordered the sum of RM14,678,135.50 to be paid by the respondents into court within two months pending the disposal of the appeal to judge in chambers on the quantum of damages.

[13] The learned judge dismissed the appellant's application for mandamus primarily on two grounds:

(a) that it was the intention of Parliament that an order for mandamus is be available only when there has been finality to the subject matter and all avenues of appeal at every stage of the proceedings have been exhausted; and

(b) that s 33 of the GPA certificate was premature since the appeal to the judge in chambers against the deputy registrar's award of damages is still pending.

[14] The learned judge stated, inter alia, in his grounds of judgment as follows:

> Namun, jika diteliti kepada kesan dari pengeluaran sesuatu perintah mandamus itu, serta jika diteliti kepada peruntukan status juga, dapat dilihat bahawa adalah menjadi *niat Parlimen* bahawa perintah mandamus hanyalah terpakai dan wajar diaplikasikan di dalam keadaan di mana sesuatu perkara itu telah menjadi suatu finality. '*Finality*' di sini bermaksud segala 'avenue'. Perundangan untuk setiap tahap prosiding kes telah dilalui dan di 'exhaust' dengan sepenuhnya. Di dalam kes sebegini, *maksud segala tahap rayuan baik di peringkat di mana sekalipun, rayuan telah didengar dan diputuskan dengan sepenuhnya. Adalah tidak menepati hasrat penggubal undang-undang (legislatures) untuk sesuatu perintah mandamus itu dikeluarkan di peringkat atau di tahap sesuatu kes itu masih belum dimuktamadkan lagi* kerana dari segi 'rationale', keputusan yang dicapai itu di tahap yang masih membolehkannya dirayu, masih belum dikatakan sebagai sesuatu yang muktamad lagi... Pengeluaran sijil bertarikh 21 September 2007 itu adalah sesuatu yang berbentuk pramatang... Sewajarnya sijil di bawah s 33(3) Akta dipohon setelah rayuan tersebut dilupuskan.
>
> (Emphasis added.)

[15] In so doing the learned trial judge has misdirected himself on the primary factual matrix for focus in the determination of the application for mandamus that was before him. He has failed, in particular, to appreciate that in law: (1) there is no valid stay of execution on the assessment of damages and (2) that the s 33(3) of the GPA certificate has never been set aside. In the

A circumstances, it is not open to the learned judge to rule that the certificate was obtained prematurely and that it ought to be applied for only after the appeal against assessment of damages has been finally disposed of. The learned trial judge has misdirected himself in law and in fact that s 33 of the GPA certificate has been issued prematurely. We are unanimous that on this
B ground alone the appeal should be allowed.

[16] Section 33 of the GPA uses clear and unambiguous language. It is beyond dispute that a certificate under s 33 of the GPA can be issued even
C when an appeal is still pending subject to the discretion of the court to direct that the payment of the whole or part of the judgment sum be suspended pending the appeal (see s 33(3) proviso). In this case the deputy registrar has exercised that discretion by suspending payment of half of the judgment sum pending the appeal to the judge in chambers.
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[17] Section 33(2) and (3) of the GPA provides that upon service of the certificate the government shall pay to the person entitled or to his solicitors the amount appearing by the certificate to be due to him together with the
E interest lawfully due. This statutory duty is subject only to the proviso under s 33(3) which empowers the court issuing certificate to suspend the whole or part of payment pending the appeal. There is no provision exempting the government from payment into court instead. It would appear that under s 33(4) of the GPA, the government is excluded from the ordinary
F enforcement procedure but on the other hand by s 33(3) of the GPA, the government is under a statutory duty to pay the judgment sum as stated in the certificate. This duty to pay under s 33(3) is clearly statutory duty which is binding on the State Government. There is no discretion whether or not to pay (see *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*
G [2008] 4 MLJ 641; [2008] 5 AMR 1).

[18] The third respondent, Pegawai Kewangan Negeri Pulau Pinang, as the officer in charge of financial matters for the state is naturally responsible for
H the payment of the sum stated in the certificate to the appellant. It is incumbent upon the court to give effect to such statutory duty to pay through the coercive force of an order of mandamus against the third respondent (see also *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*).
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[19] In the upshot, we are unanimous that the appeal is allowed with costs here and below. The order of the High Court dated 19 February 2009 was set aside. Money paid into court, if any, pursuant to the order of the High Court, shall be paid out to the appellant towards account of money due

under the s 33(3) of the GPA certificate. Towards shall be an order of mandamus against the third respondent.

Appeal allowed with costs here and below.

Reported by Kanesh Sundrum